United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-5028

ORIGINAL
WITH PROOF
OF SERVICE

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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P/S

In the Matter of

UNISHOPS, INC.,

Debtor.

JEROME ZELIN,

Claimant-Appellant,

-against-

UNISHOPS, INC.,

Debtor-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLAIMANT-APPELLANT'S REPLY BRIEF

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To Be Argued By
George Natanson, Esq.

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APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S REPLY BRIEF

Appellee (Unishops) concedes in its brief ("Question Presented" Uni. Br. P.2*) that "the sole issue

*Appellee's brief will be referred to as "Uni. Br/"

on the appeal ..." is whether Zelin's claim can be denied priority because no provision for it was made in the debtor's XI-3 order. Having made that concession and argued that issue, it then wanders at length over other points presented by Zelin's brief. In doing so, it cites a number of decisions which, upon analysis, appear irrelevant to any issue in this case. Those decisions will be summarized in this reply brief.

THE UNISHOPS STATEMENT OF FACTS

The order of Bankruptcy Judge Babitt dated December 3, 1974 was not an order "terminating the Letter Agreement effective July 16, 1974 (A.19)" (Uni. Br. p.4). That order was made when Unishops belatedly moved, at the end of November, 1974, to reject the Letter Agreement as an executory agreement. The order, as shown by the stipulation of facts (A-19) directed that the Agreement "...be deemed to have been terminated on July 16, 1974", the date of Zelin's discharge. That having been so, there was no longer anything left to reject in November, 1974. Unishops' application for rejection, however, demonstrates that its present position, that no rejection was required, is merely

another afterthought.

UNISHOPS' POINT I

It was Unishops, this very same debtor, fully familiar with Zelin's Agreement and represented by its same counsel, which obtained the XI-3 order of December 11, 1973 allowing Zelin's compensation.

The fact is that it never occurred to Unishops, or its counsel, or anyone else, that the XI-3 order was required to include the Letter Agreement. Bankruptcy Judge Babitt, who made the order, did not believe that anything other than Zelin's regular salary was to be approved by him. That is completely clear from his opinion in this case (A-31).

The contention that Zelin's severance pay is merely "a form of remuneration for Zelin's continued performance" (Uni. Br. p.7) is precisely what this Court did not hold in

Straus-Deparquet, Inc. v. Local Union No.3
386 F.2d 649 (2nd Cir. 1967),

where it decided that "severance pay is not earned from day to day ..." but is compensation for the termination of the employment relation.

Law dictionaries hardly constitute binding authority. However, the same edition of Black's Law Dictionary quoted by Unishops (Uni. Br. p.7) has a separate definition for severance pay, which it terms "Dismissal Compensation". It reads

> "The payment of a specific sum made by employer to employee for permanently terminating employment relationship primarily for reasons beyond employee's control".

The cases cited by Unishops in its Point I simply do not support its position. In

People ex rel. Bockes v. Wemple
115 N.Y.302, 22 N.E.273,

the Court considered the amount properly payable to a New York Supreme Court Justice retired for age. He was to receive whatever he received before retiring. At that time, he received $6,000. a year, plus $1,200. a year in

lieu of all expenses, for which he was not obligated to account. The Court held that the retired Justice was entitled to $7,200. a year, the amount he had received before retirement. Judge Gray wrote, at p. 309:

> "This language is substitutional in its effect. It substitutes an annual grant of money to the incumbent, in the place of an allowance for expenses. This, I think, was a clear grant of pay, or compensation, having no connection with the expenses incurred by a justice. As granted by this act, it became naturally and plainly, as much a part of the compensation to the justice as though his salary, eo nomine, had been increased to compensate him further for what his office entailed upon him in the way of duties and work. Expenses or no expenses, he became entitled to the whole of the $1,200. In my belief, from all that we can divine from language, and by reasoning from cause to effect, the intention of the legislature was to make a permanent addition to the stated salary, which should be beyond the power of subsequent legislatures to effect." (Emphasis supplied)

That case has no bearing whatever on Unishops' XI-3 contention. Equally irrelevant to that contention are:

McCloskey v. Division of Labor Law
200 F.2d 402 (9th Cir. 1947)

In re Public Ledger, Inc.
161 F.2d 762 (3rd Cir. 1947)

The McCloskey case involved severance pay which became due to employees who were discharged within three months prior to their employer's adjudication in bankruptcy. The Court held that it was entitled to priority. In the Public Ledger case, employees discharged, without notice, during the course of the proceedings, were held entitled to receive their severance pay as priority claim.

Montefalcone v. Banco Di Napoli Trust Co. of New York, 268 App.Div. 636 52 N.Y.S.2d 655 (1st Dept. 1945),

arose in a special setting. In that case, the Superintendent of Banks took possession of the defendant bank to liquidate it. Plaintiff, an employee of the bank, was discharged when the Superintendent took possession. In this action he sought, among other things, severance pay. The Court held that if the action were for damages for breach of contract of employment, it could not be maintained; but that since the severance pay was measured by the amount of previous service, plaintiff was entitled to recover it.

UNISHOPS' POINT II

Unishops' Point II is that the Agreement needed special court approval to be binding. There is no merit in that contention; and the decisions of this Court cited in Unishops' Point II have no bearing on this case.

In re Wil-low Cafeterias, Inc.
111 F.2d 429 (2nd Cir. 1940),

was a 77B case in which the debtor, without specific court approval, had entered into a collective bargaining agreement. This Court held that the contract was nevertheless valid; and that an employee covered thereby who was discharged by the debtor was entitled to vacation pay as an expense of the administration.

The decisions in

In re Avorn Dress Co.
78 F.2d 681 (2nd Cir. 1935)
and
79 F.2d 337 (2nd Cir. 1935)

are equally inapplicable. In the first case it appeared that a contract had been made by the debtor, during the

course of 77B proceedings, providing for loans from a finance company to be secured by the assignment of the debtor's accounts receivable. It was held that the contract, made during the proceeding without Court approval, was not in the ordinary course of business and was invalid; and that the lender had only an unsecured claim.

The Avorn lender thereafter brought a proceeding in which he contended that the loans had been used for payroll purposes; and that he should therefore be subrogated to the rights of payroll claimants and entitled to their priority. In the second decision, this Court refused to recognize that contention.

American Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, S.A. 280 F.2d 119 (2nd Cir. 1960)

is a far cry from this case. It appeared there that prior to filing, the debtor was a party to charter agreements covering tankers; and that those agreements were rejected pursuant to a court order. The dispute related to the applicable measure of damages. This Court held that claims

arising on that rejection were similar to claims arising on the rejection of a lease of real property.

UNISHOPS' POINT III

Unishops' Point III is a somewhat turgid effort to avoid, in one way or another, the result of its failure to effect a timely rejection of the Agreement, prior to Zelin's discharge.

The first suggestion is that the Agreement was never executory. For support of that startling conclusion, Unishops relies upon a vague comment by Prof. Countryman and a quotation from this Court's opinion in

In re Grayson-Robinson Stores, Inc.
321 F.2d 500 (2nd Cir. 1963).

That case related to a guaranty, which is a very different type of obligation. Then comes the statement that

> "Rejection is meaningless...because a debtor cannot repudiate its obligations".

But that is precisely what a debtor does every time that it rejects an executory agreement, whether it be a lease

or any other contract. The Agreement here was completely executory until Zelin was discharged. It did not become performed or capable of performance until then.

The actions of the parties are of great interest in the construction of their agreements. Unishops must have considered the Agreement executory when it moved to reject it, on that ground, in November 1974. Since that was long after it had been terminated by Unishops in June 1974, when Zelin was discharged (A-19), the Court's order merely confirmed that fact.

Unishops' claim that a contract can be rejected without either a Court order or an appropriate provision in the plan of arrangement is an obvious futility. The effort to find support for that claim, in this Court's decision in

In re Greenpoint Metalic Bed Co.
113 F.2d 881 (2nd Cir. 1940),

is equally futile. In that case, one Ratner had been employed by the debtor prior to filing of its petition,

pursuant to a contract for a term expiring after its plan of arrangement became effective. The debtor had not employed Ratner during the proceedings; but it sought to terminate his contract about two weeks after the filing of its petition. This Court found that Ratner had a valid executory contract with the debtor on the date of filing, that the grounds for the attempted termination were inadequate and that his contract had not been rejected in the plan. It held, however, that since Ratner had brought on a motion to fix his status under his contract, the Referee should have ordered it to be rejected and permitted Ratner to prove a claim. That case establishes, if anything, that the Agreement was the valid obligation of Unishops, in the absence of an actual rejection.

The decision in

United Properties Inc. v. Emporium Department Stores, Inc.
379 F.2d 55, 62 (8th Cir. 1967),

is merely another of the irrelevant decisions relied upon

by Unishops. That appeal related to the propriety of an order confirming a plan of arrangement. The Court reviewed the financial status of the debtor. It decided that the case should be remanded for further proceedings, because the plan did not appear to be feasible and in the best interest of the creditors.

A preliminary issue involved the standing of the appellants to object to the plan, after their contracts had been affirmed therein. The actual ruling on that issue, is found at page 61, where Judge Heaney wrote:

> "The appellees concede that the appellants had a right to appear at the confirmation hearing and object to the Plan of Arrangement, but argue that once the executory contracts -- the lease, the Hunsinger agreement and the pension agreement -- were affirmed by the Debtor and that such affirmation was made a part of the Plan of Arrangement, the appellants were no longer creditors and thus had no further right to object to the Plan of Arrangement or to appeal from the decision confirming the Plan." (Emphsis Supplied)

Judge Heaney's analysis of the Greenpoint case, quoted by Unishops (Uni. Br. p.20) is, with due respect to the Eighth Circuit, an inaccurate view of this

Court's holding.

The Unishops effort to distinguish Straus-Duparquet from this case is hopeless.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED AND THE ORDER OF BANKRUPTCY JUDGE BABITT AFFIRMED.

Respectfully submitted,

NATANSON, REICH & BARRISON
Attorneys for Claimant-Appellant,
Jerome Zelin

George Natanson, Esq.,
of Counsel.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

KENNETH E. KENNEDY, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 171 STERLING Pl. BROOKLYN, N.Y.

That on the 10 day of DECEMBER, 1976, deponent personally served the within CLAIMANT APPELLANT'S REPLY BRIEF upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

LEVIN + WEINTRAUB
ATTORNEYS FOR DEBTOR-APPELLEE
225 BROADWAY
NEW YORK, N.Y.

Kenneth E. Kennedy

Sworn to before me this
10 day of December, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977